given building owner to the ILEC and/or the incumbent cable operator serving the building in and of itself would be sufficient to avoid the takings problem identified by Bell Atlantic.[27]

A significant majority of courts have held that even FCC orders that result from rulemakings (as opposed to adjudicatory orders in the APA sense) qualify as "orders" for purposes of section (b).[28] As long as the FCC's order clearly requires particular persons to take particular actions upon the occurrence of specified conditions, there seems little doubt that the order would be enforceable under section 401(b).

A more serious question is whether an action for injunctive relief under section 401(b) would permit the court to determine exactly what amount is just and reasonable, or only whether a just and reasonable amount has been tendered (a binary question). While the possibility that a court might simply say "Not enough" is troubling, the *in terrorem* effect of section 401(b) may prevent such cases from occurring too often. It may be that in many or even most cases, the difference between what a service provider tenders and what a property owner asks for is less than the transaction costs involved in any federal court action. Competitive telecommunications

---

[27] Building owners, should they wish to assert a takings claim based on inadequate compensation, would need to wait until the claim is ripe, i.e., after an unsuccessful attempt to obtain just and nondiscriminatory compensation. See Samaad v. City of Dallas, 940 F.2d 925, 933 (5th Cir. 1991) (citing Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194 (1985)).

[28] Alltel Tennessee v. Tennessee Pub. Serv. Comm'n, 913 F.2d 305, 308 (6th Cir. 1990); Hawaiian Tel. Co. v. Public Utilities Comm'n of Hawaii, 827 F.2d 1264, 1271 (9th Cir. 1987), cert. denied, 487 U.S. 1218 (1988); Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 740 F.2d 566 (7th Cir. 1984). See also, Ambassador, Inc. v. United States, 325 U.S. 317 (1943), which, without specifically considering the question, affirmed an injunction based on a non-adjudicatory FCC order. The Fourth, Fifth, and Eight Circuits have taken the same position in cases that were vacated on other grounds (cited in Alltel, supra). But see New England Tel. and Tel. Co. v. Public Utils. Comm'n of Maine, 742 F.2d 1 (1st Cir. 1984) (per Breyer, J.), cert denied, 476 U.S. 1174 (1986).

providers might be willing to litigate such actions for the principle involved, but most private property owners would be less inclined to do so as long as a reasonable offer is on the table, which prima facie would be considered an offer at least equal to rates the ILEC and/or incumbent cable operator currently was being charged.

IV. LARGE-SCALE FIXED LOOP WIRELESS CLEC DEPLOYMENT IS CONTINGENT UPON NONDISCRIMINATORY ACCESS TO INSIDE WIRING FACILITIES AND POINTS OF ENTRY.

Large-scale fixed loop wireless CLEC deployment as a practical matter is heavily dependent upon nondiscriminatory access to inside wiring facilities and points of entry. WinStar is the first wireless CLEC to enter the marketplace, but will certainly not be the last. WinStar's plan for developing wireless local loop systems already is being adopted by other companies who have announced business plans and secured funding for network deployment.[29] A number of entities also are in the process of gathering funds on Wall Street or from within their own organizations to participate in the upcoming 28 GHz Local Multipoint Distribution Service auctions with the express purpose of providing wireless local loop operations.[30] Additionally, the FCC has announced tentative plans to auction a variety of other spectrum bands suited for

---

[29] For example, Teligent Corp. (formerly Associated Communications, L.L.C.), Advanced Radio Telecom (ART), BizTel, and AT&T have both announced plans to deploy wireless local loop systems throughout the United States.

[30] In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Services and for Fixed Satellite Services, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, CC Docket No. 92-297 (March 13, 1997). The 28 GHz auction is slated to occur December 10, 1997. *FCC Announces Upcoming Spectrum Auction Schedule*, FCC Public Notice, DA 97-1627 (July 30, 1997).

broadband wireless local loop.[31] The plans of all of these parties and the rapid deployment of competitive systems potentially could be *severely compromised* should it become clear that the successful bidders will not have reasonable access to inside wiring facilities from rooftop antennas, and thus will be unable to maximize the use of the spectrum to provide CLEC services. It simply does not make economic sense to bid on spectrum aggressively and build a fixed local loop network of rooftop transceivers and interconnected switches, only then to be unable to use the inside wire elements (riser conduits, connecting equipment, ducts, elevator shafts and/or other alternate pathways) of a building to go the "last hundred feet" necessary to reach down from the antenna on the rooftop to access the end user.

CONCLUSION

Access to inside wire is a fundamental element in the provision of fixed local loop and wireless video services. As contemplated by the Telecommunications Act of 1996, wireless facilities-based CLECs are a critical element of swiftly providing lower cost competitive services to the public. Current trends in the marketplace reveal that a significant percentage of building owners and operators are not providing competitive telecommunications carriers with the same

---

[31] Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz, and 48.2-50.2 GHz Frequency Bands; Allocation for Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5-42.5 GHz Frequency Band; Allocation of Spectrum in the 46.9-47.0 GHz Frequency Band for Wireless Services; and Allocation of Spectrum in the 37.0-38.0 GHz and 40.0-40.5 GHz Frequency Bands for Government Operations, Notice of Proposed Rulemaking, IB Docket No. 97-95, RM-8811 (Released: March 11, 1997), 62 Fed. Reg. 16129 (April 4, 1997). See also, In re Amendment of Parts 2, 15 and 97 of the Commission's Rules To Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications, Second Report and Order, ET Docket No. 94-124 (Released July 21, 1997).

access to inside wire facilities, conduits, ducts and elevator shafts as they traditionally have to incumbent local exchange carriers and incumbent cable companies. These actions run counter to the goals and objectives of the Telecommunications Act of 1996.

Ultimately, the inability of wireless providers to access inside wiring could deny the public the benefit of "alternative technology" competitors -- and thus innovative services -- in the marketplace. Moreover, failure by the FCC in this instance to do what they are statutorily and constitutionally empowered to do, i.e., mandate non-discriminatory access to pre-existing inside wire, house riser, and riser conduit space, may have further significant unintended economic impacts. In particular, query whether the numerous proposed auctions of the millimeter wave bands will be severely compromised. Fortunately, the FCC has the opportunity to issue a rule giving telecommunications providers physical access to inside wiring on non-discriminatory terms, so long as the building owners are justly compensated. In adopting a national framework for inside wiring access, the FCC would be furthering the goals of the Telecommunications Act of 1996, which clearly contemplated reasonable access to inside wiring facilities nationwide for the providers of wireless competitive local exchange carrier services.

Respectfully submitted,

WINSTAR COMMUNICATIONS, INC.

By: _____

Timothy Graham
Robert Berger
Russell Merbeth
Barry Ohlson
Joseph Sandri, Jr.

1146 19th Street, N.W. Suite 200
Washington, D.C. 20036
(202) 833-5678

Date: August 5, 1997

Certificate of Service

I, Meredith A. May, hereby certify that a copy of the foregoing "Comments of WinStar Communications, Inc." has been served this 5th day of August, 1997, via first class mail, postage prepaid or by hand delivery to the following:

Reed Hundt
Chairman
Federal Communications
Commission
1919 M Street, NW
Room 814
Washington, DC 20554

Rachelle Chong
Commissioner
Federal Communications
Commission
1919 M Street, NW
Room 844
Washington, DC 20554

Susan Ness
Commissioner
Federal Communications
Commission
1919 M Street, NW
Room 832
Washington, DC 20554

James Quello
Commissioner
Federal Communications
Commission
1919 M Street, NW
Room 802
Washington, DC 20554

Marsha McBride
Legal Advisor to the Commissioner
James Quello
Federal Communications
Commission
1919 M Street, NW Room 802
Washington, DC 20554

Meredith Jones
Federal Communications
Commission
Chief
Cable Services Bureau
2033 M Street, NW
Room 918A
Washington, DC 20554

Rick Chessen
Federal Communications
Commission
Assistant Bureau Chief
Cable Services Bureau
2033 M Street, NW
Room 918A
Washington, DC 20554

Barbara Esbin
Federal Communications
Commission
Associate Bureau Chief
Cable Services Bureau
2033 M Street, NW
Room 904
Washington, DC 20554

Lawrence Walke
Senior Attorney
Cable Services Bureau
Federal Communications
Commission
2033 M Street, NW
Room 408A
Washington, DC 20554

Regina Keeney
Chief
Common Carrier Bureau
Federal Communications
Commission
1919 M Street, NW
Room 500
Washington, DC 20554

Kathleen Levitz
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications
Commission
1919 M Street, NW
Room 500
Washington, DC 20554

Joseph Casey
Acting Chief
Compliance and Information
Bureau
Federal Communications
Commission
1919 M Street, NW
Room 734
Washington, DC 20554

Dan Phythian
Chief
Wireless Telecommunications
Bureau
Federal Communications
Commission
2025 M Street, NW Room 5002
Washington, DC 20554

JoAnn Lucanik
Chief
Policy and Rules Division
Federal Communications
Commission
2033 M Street, NW
Room 804-Q
Washington, DC 20554

Claire Blue
Attorney Advisor
Policy and Rules Division
Federal Communications
Commission
2033 M Street, NW
Room 406
Washington, DC 20554

Timothy Peterson
Deputy Division Chief
Accounting and Audits Division
Federal Communications
Commission
2000 L Street, NW
Room 812
Washington, DC 20554

Rosalind Allen
Wireless Telecommunications
Bureau
Federal Communications
Commission
2025 M Street, NW Room 5002
Washington, DC 20554

Elizabeth W. Beaty
Federal Communications
Commission
Cable Services Bureau
2033 M Street, NW
8th Floor
Washington, DC 20554

Jackie Chorney
Legal Advisor
Office of Chairman Hundt
Federal Communications
Commission
1919 M Street, NW
Room 814
Washington, DC 20554

Daniel Gonzalez
Office of Commissioner Chong
Federal Communications
Commission
1919 M Street, NW
Room 844
Washington, DC 20554

Marian Gordon
Common Carrier Bureau
Federal Communications
Commission
2000 M Street, NW
Room 210L
Washington, DC 20554

Debra Harper
Federal Communications
Commission
1919 M Street, NW
Room 538-G
Washington, DC 20554

Geraldine Matise
Federal Communications
Commission
2000 M Street, NW
Room 235
Washington, DC 20554

Nancy Stevenson
Federal Communications
Commission
2033 M Street, NW
Room 406-C
Washington, DC 20554

Anita Wallgren
Office of Commissioner Ness
Federal Communications
Commission
1919 M Street, NW
Room 832
Washington, DC 20554

Meredith A. May

EXHIBIT I

WINSTAR

CONTACTS:

Financial Community
Michelle Davis
Manager of Investor Relations
(212) 584-4053

Press
Louise Goodman
(212) 584-4083
lgoodman@wcii.com

WINSTAR – "THE NEW PHONE COMPANY" – LAUNCHES SWITCH IN SAN DIEGO

WinStar's National Expansion Continues with Fourth Major Market in 90 Days

New Alternative to Pacific Bell is Dedicated to Customer Satisfaction

NEW YORK – JUNE 25, 1997, WINSTAR COMMUNICATIONS, INC. (NASDAQ – WCII) has launched its competitive local telecommunications business in San Diego. The installation of WinStar's fourth switch in the past 90 days demonstrates the company's ability to build a national network to handle the growing demand for local phone service. WinStar, which markets itself as The New Phone Company, provides small and medium-sized business customers with a single source for local and long distance communications, Internet access, and other data services, in competition with Pacific Bell and other telephone companies.

"As the controller for a small business, I'm responsible for finding the best deal for my company," commented Marie Malaca, Controller of MailPro, a direct mail agency, and one of WinStar's initial San Diego customers. "WinStar has made the decision simple by delivering superior customer service, and creates a real value proposition with its competitive rates."

This is the fifth major market in which WinStar has installed a switch as part of the nationwide rollout of its competitive local, long distance, Internet access, and other communications services. WinStar first provides its services on a resale basis in each city, and follows initial marketing efforts with the installation of Lucent Class 5 switches within a few months. The company already has switches installed and operating commercially in New York, Chicago, Los Angeles, and Boston.

"Today, WinStar is giving San Diego business customers a real choice in local calling," said Dave Schmieg, President and Chief Operating Officer of WinStar's operating subsidiary, WinStar Telecommunications. "San Diego area customers now can enjoy the simplicity of one contract, one point-of-contact and one bill for local, long distance and other telecommunications services. WinStar is dedicated to providing more responsive service, integrated billing and faster access to communications services."

WinStar's advertising campaign will begin in mid-July, in San Diego, to create brand recognition. This advertising campaign will emphasize WinStar's commitment to customer satisfaction and introduce the WinStar brand name to small and medium-sized businesses looking for an alternative to Pacific Bell.

WinStar's competitive local telephone offering is based on its Wireless Fiber[SM] service, which is a broadband wireless local communication service provided using WinStar's licenses in the 38 GHz frequency band. WinStar's Wireless Fiber service is the functional equivalent of fiber optic cable in terms of reliability, data transmission quality, and bandwidth provided to the end user.

WinStar is rolling out its competitive telecommunications services in the top thirty markets in the United States over the next three years. WinStar already offers competitive local telephone services in 12 cities in addition to San Diego, including Atlanta, Boston, Chicago, Dallas, Hartford, Los Angeles, Milwaukee, New York, Philadelphia, San Francisco, Stamford, and Washington, D.C. The company currently fields over 400 sales and support people in these markets.

WinStar currently holds 38 GHz licenses in 47 of the top 50 U.S. markets. Upon completion of pending acquisitions, each of which is subject to FCC approval, WinStar will have license coverage in 49 of the top 50 markets in the country, and more than 160 major market areas in total, covering approximately 180 million people, and more than 650 million channel pops (population coverage multiplied by the number of channels).

WinStar Communications, Inc. is a national local communications company serving business customers, long distance carriers, fiber-based competitive access providers, mobile communications companies, local telephone companies, and other customers with broadband local communications needs. The company provides its Wireless Fiber[SM] services using its licenses in the 38 GHz spectrum. The company also provides long distance and various information services and entertainment content.

EXHIBIT II

WinStar City Model

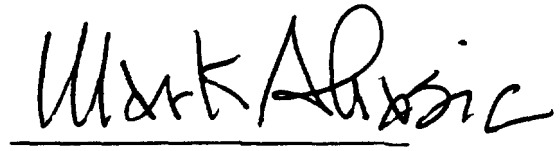
WINSTAR

EXHIBIT III

Affidavit

As Vice President - Real Estate for WinStar Wireless, Inc., it is my assessment that access by a wireless fixed service provider to inside wire in many buildings throughout the nation is being either thwarted or made on a discriminatory basis due to the demands or obstacles placed by some building owners and/or building management. Based on field observations, it is clear that many building owners and/or building management are requesting non-recurring fees, recurring fees, per linear foot basis charges, and a variety of other methods designed to obtain a revenue stream and/or up-front payment which is not based on the reasonable or actual costs of doing business. Moreover, it is evident that incumbent local exchange and wireline cable providers are not asked to pay these fees. Generally, many building owners and/or building management seek to characterize inside wire building access requests by WinStar as an opportunity to gather revenues in a manner which fails to reflect reasonable and non-discriminatory prices or conditions.

Signed:



Mark Ahasic
Vice President - Real Estate
WinStar Wireless, Inc.

WinStar

Unreasonable Building Owner/Management Fees, Delays or Conditions Encountered When Attempting to Access Inside Wire

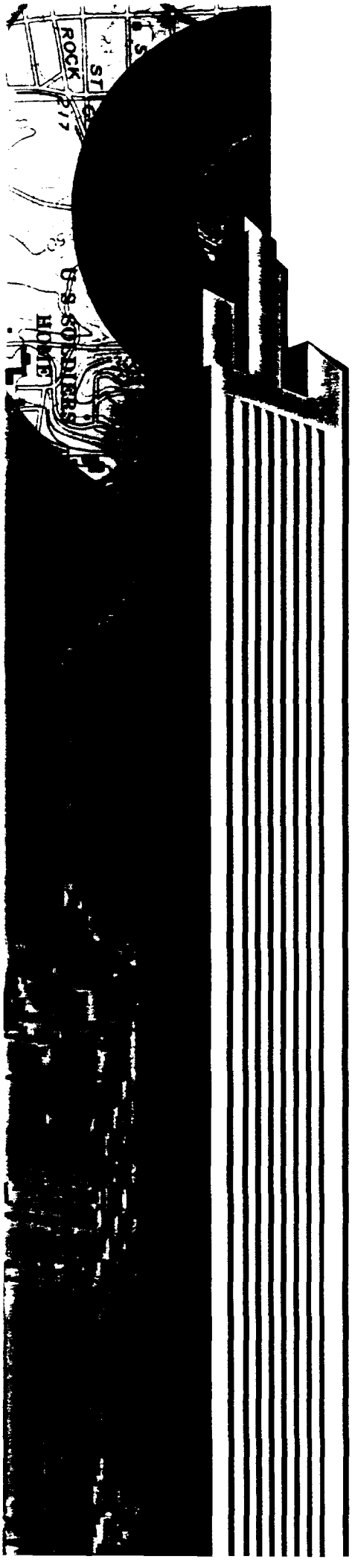
Representative Cities	Unreasonable Rooftop Access Fees or Conditions	Unreasonable Non-Recurring Fees	Unreasonable Recurring Fees	Unreasonable Per Linear Foot Charges for Conduit	Capacity Charges (Per DS1 or DS3)	Unreasonable Percent of Revenue	Unreasonable Monthly Rents	Free Service Requested for Building Owners/ Managers	Unreasonable Length of Negotiation	Low Number of Buildings Secured After Conducting Multibuilding Negotiations
Boston	X	X	X	X	X	X	X	X	X	X
Chicago	X	X	X	X	X	X	X	X	X	X
Los Angeles	X	X	X	X	X		X		X	X
New York	X	X	X	X	X	X	X	X	X	X
San Diego	X						X		X	X
San Francisco	X	X	X	X	X		X	X	X	X
Washington, D.C.	X	X	X	X	X	X	X	X	X	X

i:\dc_office\andrit\inswir.cht

EXHIBIT IV

WinStar Elements

WinStar installs a small, unobtrusive (12" diameter) millimeter wave dish(es) on the building rooftop (often invisible from the street). Installation is quick and simple, and requires no underground construction or right-of-way acquisition.



Does WinStar Limit Our Choice of Telecommunications Providers?

• NO

WinStar increases your tenants' choice of communications by providing "access" facilities for telecommunications carriers who are trying to service your tenants without having to lay fiber optic cables.

Is WinStar Asking Owners to Purchase a Product For Themselves or for the Building?

• NO

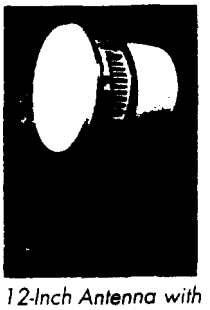
WinStar provides the tenant amenities as outlined in the enclosed materials at no cost to the building owner.

Will the Aesthetics of the Building Be Maintained?

• YES

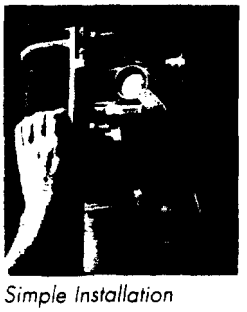
WinStar installs a small, unobtrusive (12" diameter) millimeter wave dish(es) on the building rooftop (often invisible from the street) and connects the unit to an indoor unit mounted inside a 22-inch telecommunications equipment cabinet in an existing closet or mechanical space via a single coaxial cable.

The installation is quick and simple, and requires no underground construction or right-of-way acquisition. It is equivalent to high capacity fiber links, without digging up streets or sidewalks.

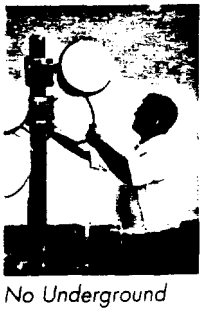


12-Inch Antenna with Indoor Unit (IDU)

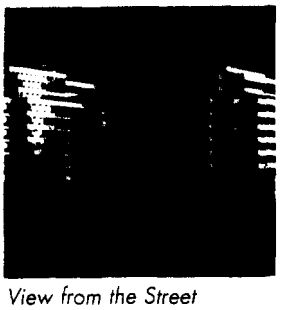
Telecommunications Equipment Cabinet



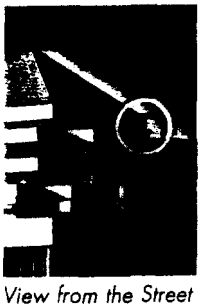
Simple Installation



No Underground Construction



View from the Street (Distant)

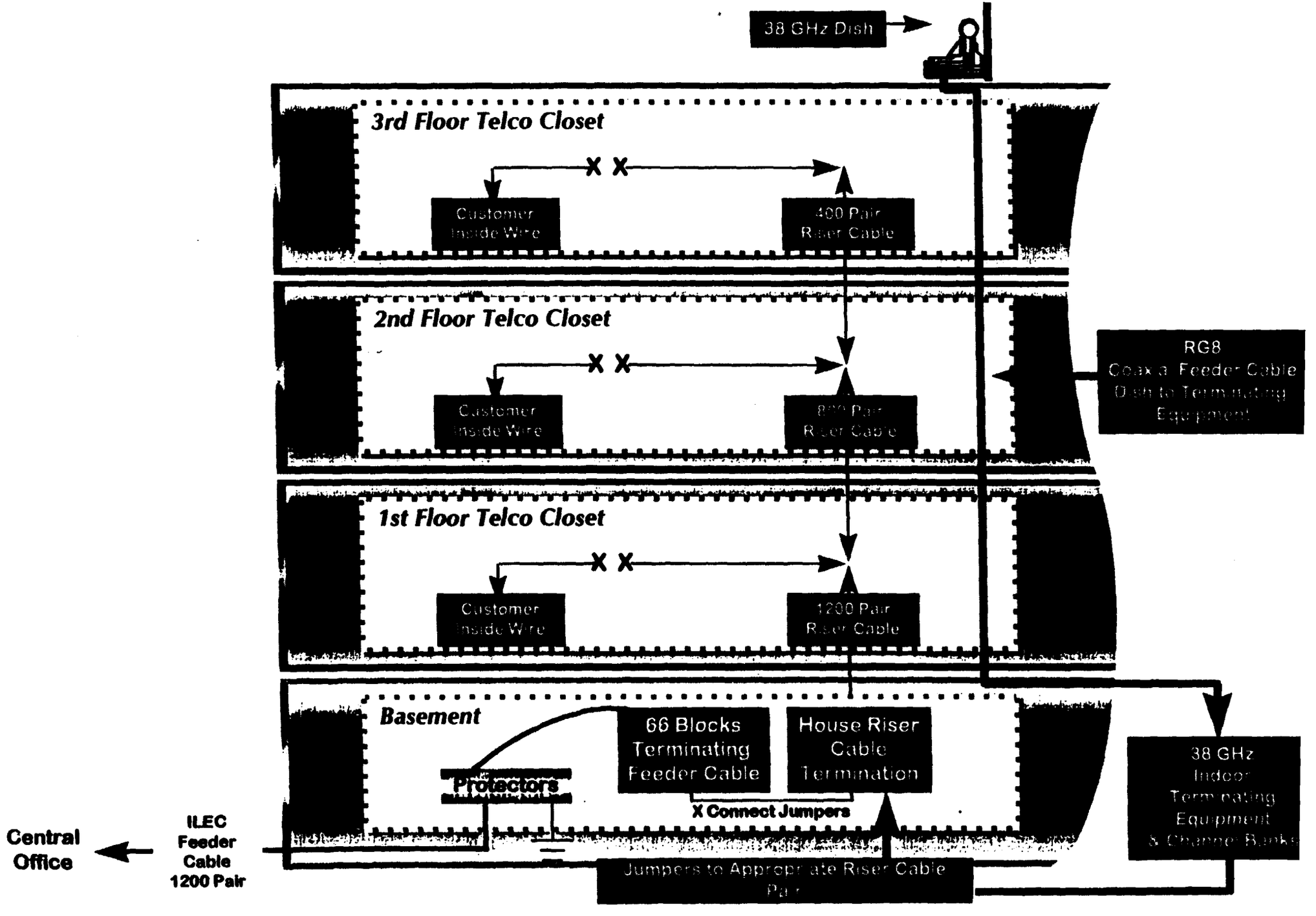


View from the Street (Close-up)

WINSTAR

EXHIBIT V

WINSTAR HIGH-RISE 38 GHZ APPLICATION



SIMPLIFIED TELECOMMUNICATIONS RISER WIRING DIAGRAM

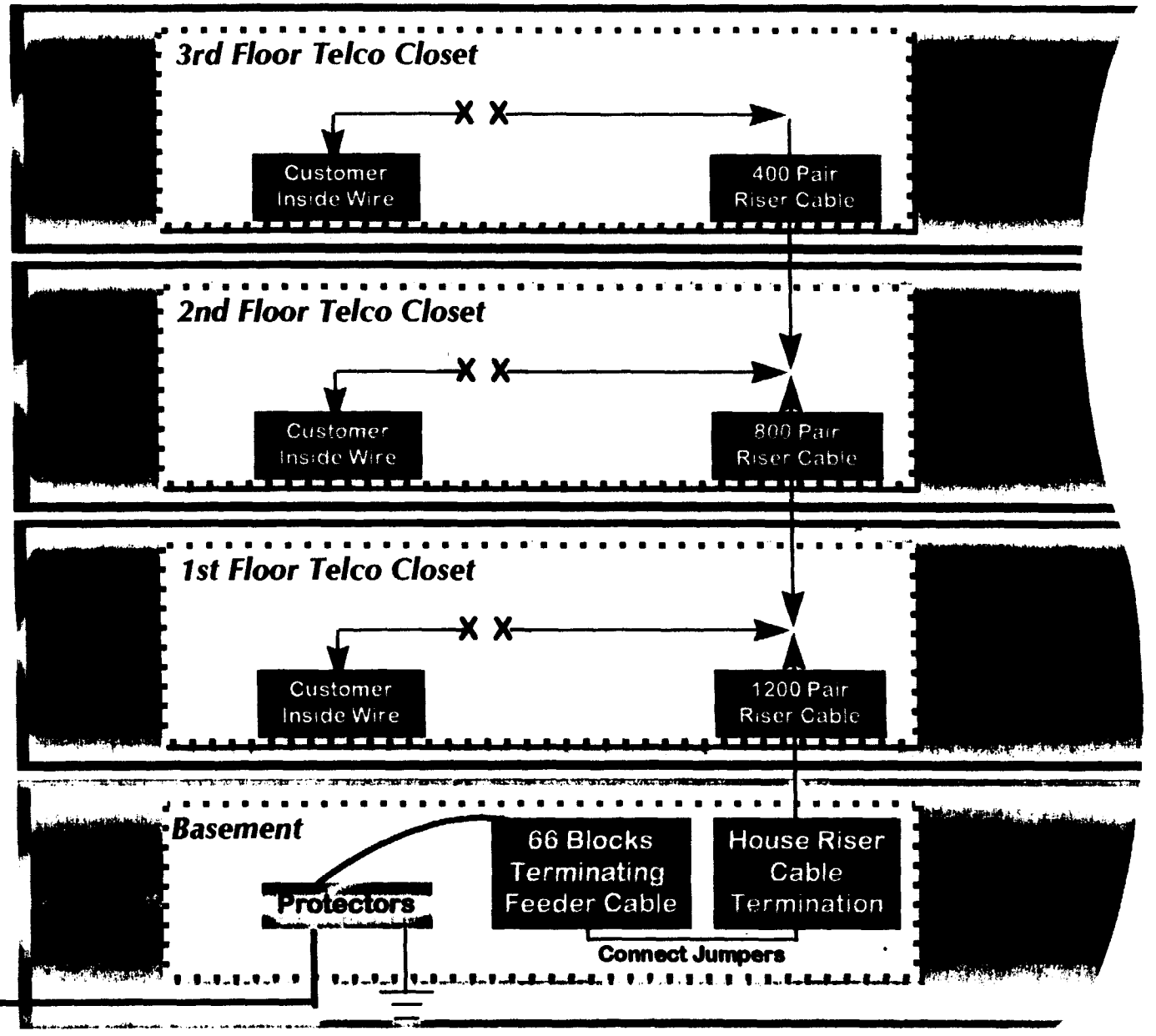


EXHIBIT VI

104TH CONGRESS
2d Session

SENATE

REPORT
104–230

TELECOMMUNICATIONS ACT OF 1996

FEBRUARY 1, 1996.—Ordered to be printed

Mr. PRESSLER, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the "Telecommunications Act of 1996".

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

portionate share of the costs incurred by the owner in making such conduit or right-of-way accessible.

Conference agreement

The conference agreement adopts the Senate provision with modifications. The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms, and conditions for attaching to poles, ducts, conduits, and rights-of-way owned or controlled by utilities. New subsection 224(e)(2) establishes a new rate formula charged to telecommunications carriers for the non-useable space of each pole. Such rate shall be based upon the number of attaching entities. The conferees also agree to three additional provisions from the House amendment. First, subsection (g) requires utilities that engage in the provision of telecommunications services or cable services to impute to its costs of providing such service an equal amount to the pole attachment rate for which such company would be liable under section 224. Second, new subsection 224(h) requires utilities to provide written notification to attaching entities of any plans to modify or alter its poles, ducts, conduit, or rights-of-way. New subsection 224(h) also requires any attaching entity that takes advantage of such opportunity to modify its own attachments shall bear a proportionate share of the costs of such alterations. Third, new subsection 224(i) prevents a utility from imposing the cost of rearrangements to other attaching entities if done solely for the benefit of the utility.

SECTION 704—FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS

Senate bill

No provision.

House amendment

Section 108 of the House amendment required the Commission to issue regulations within 180 days of enactment for siting of CMS. A negotiated rulemaking committee comprised of State and local governments, public safety agencies and the affected industries were to have attempted to develop a uniform policy to propose to the Commission for the siting of wireless tower sites.

The House amendment also required the Commission to complete its pending Radio Frequency (RF) emission exposure standards within 180 days of enactment. The siting of facilities could not be denied on the basis of RF emission levels for facilities that were in compliance with the Commission standard.

The House amendment also required that to the greatest extent possible the Federal government make available to use of Federal property, rights-of-way, easements and any other physical instruments in the siting of wireless telecommunications facilities.

Conference agreement

The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over

The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases. The term "final action" of that new subparagraph means final administrative action at the State or local government level so that a party can commence action under the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.

With respect to the availability of Federal property for the use of wireless telecommunications infrastructure sites under section 704(c), the conferees generally adopt the House provisions, but substitute the President or his designee for the Commission.

It should be noted that the provisions relating to telecommunications facilities are not limited to commercial mobile radio licensees, but also will include other Commission licensed wireless common carriers such as point to point microwave in the extremely high frequency portion of the electromagnetic spectrum which rely on line of sight for transmitting communication services.

SECTION 705—MOBILE SERVICE DIRECT ACCESS TO LONG DISTANCE CARRIERS

Senate bill

Subsection (b) of section 221 of the Senate bill, as passed, states that notwithstanding the MFJ or any other consent decree, no CMS provider will be required by court order or otherwise to provide long distance equal access. The Commission may only order equal access if a CMS provider is subject to the interconnection obligations of section 251 and if the Commission finds that such a requirement is in the public interest. CMS providers shall ensure that its subscribers can obtain unblocked access to the interexchange carrier of their choice through the use of interexchange carrier identification codes, except that the unblocking requirement shall not apply to mobile satellite services unless the Commission finds it is in the public interest.

House amendment

Under section 109 of the House amendment, the Commission shall require providers of two-way switched voice CMS to allow their subscribers to access the telephone toll services provider of their choice through the use of carrier identification codes. The Commission rules will supersede the equal access, balloting and prescription requirements imposed by the MFJ and the AT&T-McCaw consent decree. The Commission may exempt carriers or classes of carriers from the requirements of this section if it is consistent with the public interest, convenience, and necessity, and the